BOYCOTTING A BOYCOTT: A FIRST AMENDMENT ANALYSIS OF NATIONWIDE ANTI-BOYCOTT LEGISLATION

Note

TABLE OF CONTENTS

ABSTRACT

Since 2015, several states have passed or proposed laws curtailing the right to participate in the Boycott, Divestment, Sanction ("BDS") movement targeted against the State of Israel. Supporters of the BDS movement argue that it is a human rights movement aimed at fighting for the rights of oppressed Palestinians in illegally occupied Palestinian territory. Critics of the movement suggest that BDS is a discriminatory movement harmful to America and Israel and it should not be given room in the public sphere to spread its message. This note contends that, regardless of one's political stance on the BDS movement, the movement's public call for a concerted refusal to engage in commercial activity with institutions supportive of the State of Israel are protected under established First Amendment jurisprudence and should be defended vigorously.

I. INTRODUCTION

In 2015, Illinois became the first state in the country to enact legislation aimed at punishing and eliminating support for the Boycott, Divestment, Sanction ("BDS") movement[1] against the State of Israel.[2] The amendment to the Illinois Pension Code calls for the creation of a list of companies boycotting Israel and requires the state's pension funds to divest from those companies.[3] Although the Illinois legislation was limited and explicitly intended *not* to "cause divestiture from any company based in the United States of America,"[4] it was only the opening salvo in what has become a "flurry of anti-BDS legislative activity."[5]

Since the passing of the Illinois bill, "at least 102 anti-BDS measures have been introduced[,]24 states have enacted anti-BDS laws," and multiple bills have been introduced in the U.S. Senate.[6] The laws have

1. See *infra* Part I.B for a more detailed discussion of the BDS movement.

2. *Illinois Governor Signs Anti-BDS Bill into Law*, PALESTINE LEGAL (July 24, 2015), http://palestinelegal.org/news/2015/7/24/illinois-governor-signs-anti-bds-bill-into-law?rq=illinois; *See also* 2015 Ill. Legis. Serv. 99-128 (West).

3. The amendment specifically orders the establishment of an Illinois Investment Policy Board tasked with identifying all "companies that boycott Israel and assembl[ing] those identified companies into a list of restricted companies, to be distributed to each retirement system." 2015 Ill. Legis. Serv. 99-128 (West).The retirement system must then "identify those companies on the list of restricted companies in which the retirement system owns direct holdings and indirect holdings" and "instruct its investment advisors to sell, redeem, divest, or withdraw all direct holdings of restricted companies from the retirement system's assets . . . within 12 months." *Id.*

4. *Id.*

5. Note, *First Amendment—Political Boycotts—South Carolina Disqualifies Companies Supporting BDS From Receiving State Contracts—S.C. Code Ann. § 11-35-5300 (2015)*, 129 HARV. L. REV. 2029, 2031 (2016) [hereinafter *South Carolina Note*].

6. *Anti-BDS Legislation by State*, PALESTINE LEGAL (last visited March 1, 2019), http://palestinelegal.org/righttoboycott; S. 720, 115th Cong. (2017); S. 1, 116th Cong. (2019). Much of this legislation has been supported by organizations such as the American Jewish Congress ("AJC"). Paradoxically, the AJC, which has been instrumental in pushing for anti-BDS legislation and considers challenging the BDS movement a high priority on its current agenda, *Issues*, AMERICAN JEWISH CONGRESS, http://ajcongress.org/about (last visited March 1, 2019), filed a Motion for Leave to File Brief Amicus Curiae in support of the *Claiborne Hardware* boycotters. Brief Amicus Curiae of the American Jewish Congress, NAACP v. Claiborne Hardware Company, 458 U.S. 886 (1982) (No. 81-202), 1981 WL 390216 [hereinafter AJC Brief]. Early in the AJC's history, the organization had staged a general boycott against Nazi Germany despite opposition from the German government and the U.S. State Department. *Id.* They also supported boycotts of farm and textile products in connection with labor disputes as well as the boycott of convention facilities in states that did not ratify the Equal Rights Amendment at issue in Missouri v. National Organization for Women, Inc., 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980). In supporting the *Claiborne* boycotters, the AJC stated their position: "We believe that it is not consistent with the First Amendment, or with the long tradition of political protest in the United States, to punish or prohibit legitimate political activity, including

taken various forms, with many states taking a much broader approach than Illinois and refusing to limit the legislation to companies or organizations based outside of the United States.[7] Some bills call for state pension fund divestiture from any organizations involved in the BDS movement, while others disqualify entities engaged in a boycott against Israel from contracting with the state.[8] Several legislators have made clear that their intent is to defend the State of Israel against the social, political, and economic harms of a boycott.[9] Others have thinly veiled their bills and legislation as being generally anti-discriminatory as opposed to being specifically against a boycott of Israel.[10] Regardless of the approach, the effect is the same: anti-BDS laws will result in individuals and organizations being blacklisted for participating in a political movement, often with absurd consequences. For example, under Pennsylvania's version of an anti-BDS bill, universities that endorse BDS could lose state funding.[11] In Texas, a speech pathologist lost her job after refusing to sign an oath vowing not to engage in a boycott of Israel.[12] In New York, United Methodist and Presbyterian churches may have state funding for food pantries, soup kitchens, and homeless shelters removed because of their support for a boycott of companies operating in

boycotts, ... "AJC Brief at 2. It is unclear where the AJC draws the distinction between boycotts they believe are protected under the First Amendment and those they do not.

7. *See South Carolina Note*, *supra* note 5, at 2030–31.

8. *See South Carolina Note*, *supra* note 5, at 2030–31.

9. *See* Andrew Cuomo, *Gov. Andrew Cuomo: If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985f6a265c_story.html;Boycott Our Enemies Not Israel Act, H.R. 1572, 114th Cong. § d(1)(B) (2015) (seeking to require all prospective U.S. government contractors to certify, under penalty of perjury, that they are not "refusing, or requiring any other person to refuse, to do business with or in the State of Israel, with any national or resident of the State of Israel, or a business concern organized under the laws of the State of Israel.").

10. *See, e.g.*, Assemb. B. 2844, Chapter 581 (Cal. 2016) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2844. Although the stated intent of California's legislation is to "ensure that taxpayer funds are not used to do business with or otherwise support any state or private entity that engages in discriminatory actions against individuals under the pretext of exercising First Amendment rights," the same section is careful to specify that this includes actions "under the pretext of a constitutionally protected boycott or protest of the State of Israel." *Id.* at § 1(j).

11. H.B. 1018, 199 Leg., 2015 Sess. (Pa. 2015) ("[P]rohibiting funding to an institution of higher education that engages in a boycott against or divestment from Israel.").

12. Glenn Greenwald, *A Texas Elementary School Speech Pathologist Refused to Sign a Pro-Israel Oath, Now Mandatory in Many States — so She Lost Her Job*, THE INTERCEPT (Dec. 17, 2018, 6:58 AM), https://theintercept.com/2018/12/17/israel-texas-anti-bds-law/.

illegal Israeli settlements.[13] Such penalties will inevitably result in a chilling effect[14] on participation in, and vocal support of, the BDS movement by individuals and entities. Many supporters of the BDS movement, especially those heavily dependent on government funding, will be pressured to withdraw their support when faced with potential legal ramifications or a threat to their livelihood. The resulting gradual decline in support for the movement will eventually threaten the viability of the movement as a whole.

This note contends that participation in, and support of, the BDS movement by individuals and entities is a right protected under the First Amendment to the United States Constitution.[15] Legislation against the movement violates participants' constitutionally guaranteed rights of speech, assembly, and petition, and results in a chilling effect on the exercise of those rights. Part I explores the background and history of boycott movements—and the BDS movement in particular—and establishes that boycotts are an integral and powerful part of the American political tradition. Part II seeks to establish a constitutional framework with which the BDS movement can be analyzed. This includes a discussion of the Supreme Court's landmark decision in *NAACP v. Claiborne Hardware Co.* (*Claiborne Hardware*),[16] a brief comparison between *Claiborne Hardware* and the Court's analysis of boycotts under labors laws in *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.* (*International Longshoremen*)[17], and an analysis of the doctrine of unconstitutional conditions[18] with specific emphasis on the Court's rulings in *Rust v. Sullivan*[19] and *Agency for*

13. *See* Laurie Goodstein, *Presbyterians Vote to Divest Holdings to Pressure Israel*, N.Y. TIMES (June 20, 2014), http://www.nytimes.com/2014/06/21/us/presbyterians-debating-israeli-occupation-vote-to-divest-holdings.html;David Wildman, *Anti-BDS Legislation Violates Free Speech*, NAT'L CATH. REP. (Apr. 21, 2016), https://www.ncronline.org/blogs/ncr-today/anti-bds-legislation-violates-free-speech.

14. "A 'chilling effect' describes a situation in which speech or conduct is inhibited or discouraged by fear of penalization, prompting self-censorship and therefore hampering free speech." Joshua Rissman, *Put it on Ice: Chilling Free Speech at National Conventions*, 27 L. & INEQ. 413, 413 (2009).

15. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.")

16. 458 U.S. 886 (1982).

17. 456 U.S. 212 (1982).

18. The doctrine of unconstitutional conditions "posits that a condition attached to the grant of a governmental benefit is unconstitutional if it requires the relinquishment of a constitutional right." Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 98 (1988).

19. 500 U.S. 173 (1991).

International Development v. Alliance for Open Society International (*AID v. Alliance*).[20] Part III examines the enacted anti-BDS legislation of New York and California and applies this note's established constitutional framework to determine if those states' bills and legislation would survive constitutional scrutiny. Finally, Part IV concludes that, although "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances,"[21] the governmental regulations at issue here have more than an incidental effect on the First Amendment right to participate in BDS boycotts, and efforts to ban BDS activity do not fit into such narrowly defined instances and are thus unconstitutional. Part IV will also examine the policy considerations attached to the debate over anti-BDS legislation and explore the potential ramifications of such legislation on a broader scale. Ultimately, this note will establish that most forms of anti-BDS legislation throughout the nation would not survive a constitutional challenge under the First Amendment and should be repealed.

I. BACKGROUND AND HISTORY

A. A History of Political Boycotts[22]

The boycott of commercial goods is a powerful tool of political protest ingrained in American history since the time of the Founders.[23] The historical roots of the boycott "caution against its dismissal as mere coercion or inappropriate action."[24] The United States Supreme Court has noted, "the practice of persons sharing common views banding

20. 133 S. Ct. 2321 (2013).

21. Claiborne Hardware, 458 U.S. at 912 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

22. The term "political boycott" is used throughout this note to signify the organized "refusal [by consumers] to buy goods or patronize certain businesses . . . in order to effect political or social change." Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531, 531 (2012). This is in comparison to the terms "commercial" or "economic boycott"—used to describe boycotts "organized for the purpose of an economic profit, by a group composed primarily of businessmen"—and "labor boycott" which describes "economic action by unions through their refusal to deal with an employer and the inducement of other unions or the general public to do so as well." Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 660 n.11 (1978).
The background portion of this note draws heavily from the thorough research of Theresa J. Lee's work *Democratizing the Economic Sphere*, *supra* note 22.

23. Leonard Orland, *Protection for Boycotts*, N.Y. TIMES (July 31, 1982), http://www.nytimes.com/1982/07/31/opinion/protection-for-boycotts.html.

24. Lee, *supra* note 22, at 538.

together to achieve a common end is deeply embedded in the American political process."[25] Over the past several centuries, effective use of political boycotts has served as one of the main catalysts to the birth of our nation and has continued to play a role in the progressive demand for recognition by those who feel they have been denied their due rights.[26]

In colonial America, political boycotts "were organized by hundreds and supported by thousands of citizens."[27] Many of the nation's Founding Fathers played a role in supporting, drafting, and enforcing non-importation agreements against British merchants.[28] In 1765 and 1766, the English refusal to repeal the Stamp Act led to the peaceful boycott of British merchants by American colonists.[29] During the boycott, merchants from several American cities signed written agreements to refuse to import goods from Britain until the Act was repealed.[30] The Stamp Act was eventually repealed, but Parliament soon adopted the Townshend Acts, imposing duties on basic items like glass, paper, and tea.[31] Once again, merchants—joined by persons of other occupations throughout the colonies—resorted to non-importation agreements.[32] These agreements included social ostracism and personal boycotts against those who violated the agreements.[33] This movement led to the repeal of the Townshend Acts, but the subsequent enactment of a new Tea Act resulted in renewed efforts to boycott all imports of tea, eventually leading to the Boston Tea Party.[34] The Boston Tea Party set in motion a chain of events that provoked heightened tensions between Britain and the colonies, leading to more wide-ranging boycotts, and eventually the American Revolutionary War.[35]

The use of boycotts as a means of political action did not end with the colonial period and the birth of our nation.[36] Later in American history,

25. Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294 (1981) (hereinafter *Citizens Against Rent Control*).

26. *See id.*

27. Brief for Petitioners at 18, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1992) (No. 81-202).

28. *See id.* at 18–19. George Washington, George Mason, Thomas Jefferson, James Madison, John Hancock, Benjamin Franklin, John Adams, John Jay, John Dickinson, Patrick Henry, and Richard Henry Lee were just a few of the prominent founders of our nation who supported the use of boycotts to deliver their political messages. *Id.*

29. *Id.* at 17.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 18.

35. *See id.*

36. Lee, *supra* note 22, at 538.

boycotts saw continued effectiveness in the fight against racial injustice.[37] In the years before the Civil War, abolitionists organized a boycott of slave-made goods.[38] In the early 1900s, streetcar boycotts took place across the South to fight against Jim Crow segregation laws,[39] and in the mid-1950s, Dr. Martin Luther King helped organize what would become one of the most well-known and influential consumer boycotts in American history—the Montgomery Bus Boycott.

Beginning in the winter of 1955, the African-American community of Montgomery, Alabama boycotted all city buses in response to Rosa Parks' arrest for refusing to sit at the back of a city bus[40] and in protest against the racial segregation and abuses perpetuated by the city bus system.[41] The Montgomery boycotters were unanimous in their agreement to boycott city buses until they gained three demands: "1. courteous treatment of black passengers, 2. seating on a first-come, first-served basis, with blacks filling the bus from the rear and whites from the front and no reserved seats for whites or blacks and 3. hiring of black drivers on predominantly black routes."[42]

The goals of the Montgomery boycott slowly shifted to demand the complete elimination of segregation on the buses and thousands of African-Americans enthusiastically participated in the protest.[43] The boycotters even managed to create their own car-pool system and maintained a fleet of vehicles to provide transportation to the community.[44] The movement was overwhelmingly effective and resulted in millions of dollars in lost sales to white business owners and a

37. Lee, *supra* note 22, at 539.

38. Brief for Petitioners at 20, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1992) (No. 81-202).

39. *See id.*

40. At the time of her arrest on December 1, 1955, Rosa Parks was a 43-year-old seamstress at a Montgomery department store. She also happened to be a former secretary of the Montgomery NAACP chapter. Although Parks has often been imagined as a "simple black woman whose feet were tired from working all day for the white folks," she was no stranger to the "larger concept of struggling for racial justice." SANFORD WEXLER, THE CIVIL RIGHTS MOVEMENT: AN EYEWITNESS HISTORY 67–68 (1993).

41. Black passengers were required to pay their bus fares at the front of the bus, then get off the bus and board from the rear entrance. *Id.* at 67. Many were arrested for refusing to give up their seats. *See* DONNIE WILLIAMS WITH WAYNE GREENHAW, THE THUNDER OF ANGELS: THE MONTGOMERY BUS BOYCOTT AND THE PEOPLE WHO BROKE THE BACK OF JIM CROW 48–50 (2006). Several were even killed on the buses at the hands of policemen. *See id.* at 12–15.

42. WEXLER, *supra* note 40, at 72–73 (1993).

43. *Id.* at 73.

44. *Id.*

significant drop in the bus company's income.[45] After nearly a year of boycotts, the United States Supreme Court conclusively declared that Alabama's state and local laws requiring segregation were unconstitutional.[46]

Beyond the Civil Rights Movement and the fight for racial justice, boycotts have been deployed effectively by many other groups to achieve political or social ends.[47] In the early 1990s, the AIDS Coalition to Unleash Power used boycotts against Philip Morris in an attempt to influence its support of Senator Jesse Helms, who had frequently condemned homosexuality.[48] Although the boycott failed to influence support for the Senator, it "succeeded in bringing gay issues to the consciousness of Philip Morris," which pledged over $2 million in annual contributions to gay rights and AIDS organizations.[49]

In 1991, gay rights advocates again deployed a boycott, this time against Cracker Barrel after the company fired several gay and lesbian employees and stated it would not hire anyone "whose sexual preferences fail to demonstrate normal, heterosexual values."[50] The Cracker Barrel boycott lasted for over a decade until the company's board finally enacted a non-discrimination policy that offered protection based on sexual orientation.[51] A similar boycott was used against Chick-Fil-A after statements by the company's president against the expansion of marriage rights to homosexual couples.[52]

Boycotts by gay advocacy groups were also initiated against the state of Colorado after the state approved a constitutional amendment repealing laws preventing discrimination based on sexual orientation.[53] The movement encouraged consumers not to purchase goods from Colorado businesses, discouraged travel to Colorado, and was supported by the official participation of over 100 groups.[54] This boycott endured

45. *Id.* at 73*; see also* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1022 (1989).

46. *See* Gayle v. Browder, 352 U.S. 903 (1956) (per curiam); WEXLER, *supra* note 40, at 75.

47. Lee, *supra* note 22, at 543.

48. *Id.* at 541.

49. *Id.*

50. *Id.*

51. *Id.* at 541–42.

52. *Id.* at 541.

53. Lee, *supra* note 22, at 542–43.

54. *Id.*

until Colorado's Supreme Court held the amendment to be unconstitutional.[55]

Religious groups have also found the use of political boycotts to be an effective tool in garnering support for their agenda. In the 1930s the Catholic Church initiated a boycott against motion pictures that "violated the Motion Picture Production Code."[56] The Church encouraged Catholics to take a pledge not to watch certain movies with objectionable content and to recruit more people to the boycott.[57] Within a few months, several million individuals from multiple religious denominations were taking part in the movement.[58] The pressure of the protest was so powerful that, even today, motion pictures are regulated by the Motion Picture Association of America, an independent oversight body that evaluates and rates movies based on their content.[59] In the late 1980s and early 1990s, religious groups also initiated boycotts against advertisers in an attempt to influence television programming.[60] These groups were successful in persuading advertisers to withdraw their advertising dollars from programs with sex, violence, and profanity, and move them toward programs that conformed to religious values.[61] The same groups later pushed for a boycott of the television show "Ellen" because it featured a lesbian main character, and against the Walt Disney Company "to protest their 'gay friendly' policies."[62]

Outside the context of domestic politics, boycotts have been effectively deployed throughout the world as a means of asserting political rights. One of the most successful non-violent movements in modern history was the global effort to boycott, isolate, and sanction apartheid South Africa—a movement that rendered the country "an

55. *Id.* at 543; *see also* Evans v. Romer, 882 P.2d 1335, 1349–50 (Colo. 1994). The United States Supreme Court affirmed the Colorado state supreme court's decision in the landmark case of *Romer v. Evans*, 517 U.S. 620 (1996).

56. Lee, *supra* note 22, at 543; The Motion Picture Production Code was a "code to maintain social and community values in the production of silent, synchronized and talking motion pictures" that gave guidelines on the presentation of crimes, sex, vulgarity, obscenity, and other controversial subjects in films. MOTION PICTURE PRODUCERS AND DISTRIBUTORS OF AMERICA, THE MOTION PICTURE PRODUCTION CODE,593 (1931), http://www.asu.edu/courses/fms200s/total-readings/MotionPictureProductionCode.pdf.

57. Lee, *supra* note 22, at 543.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 543–44.

62. *Id.* at 544.

international pariah for decades."[63] In the years between 1960 and 1990, South Africa was subject to a wide-spread, multi-pronged strategy of international pressure including international and cultural isolation, as well as economic boycotts and sanctions, in an effort to end the country's system of racial apartheid.[64]

In 1962 the UN General Assembly passed a resolution deeming South Africa's apartheid regime to be in violation of the country's obligations under the UN Charter and called on UN Member States to take several measures, including boycotts, to bring about the abandonment of apartheid policies.[65] Increasing pressure was mounted on the South African regime when several cultural institutions initiated "academic" and "sports" boycotts against the country by refusing to engage with or publish South African academic scholars and having the country expelled from the 1970 Olympic Games.[66] In addition to isolation, the international effort to hurt South Africa's economy proved to be very effective. In the 1980s, the United States joined several countries in placing trade and financial restrictions on South Africa by passing legislation that prohibited new U.S. investment and bank loans, sales to the South African police and military, and the import of several South African goods.[67] Although international boycotts and sanctions may not have decisively forced the South African government to change its policies, the movement offered "moral, political and practical support" to the anti-apartheid democracy movement and proved to be an effective and influential strategy in bringing reform to a morally unjust regime.[68]

The examples detailed above highlight the historical use of political boycotts as an effective method of providing a voice to those who have

63. Catherine Barnes, *Powers of Persuasion: Incentives, Sanctions and Conditionality in Peacemaking*, 19 ACCORD 36, 38 (2008), http://www.c-r.org/accord/incentives-sanctions-and-conditionality/international-isolation-and-pressure-change-south.

64. *See id.* at 36.

65. G.A. Res. 1761 (XVII), U.N. GAOR, 17th Sess., at 9 (Nov. 6, 1962). The Resolution requested Member States to:

> (a) Break[] off diplomatic relations with the Government of the Republic of South Africa; (b) Clos[e] their ports to all vessels flying the South African flag; (c) Enact[] legislation prohibiting their ships from entering South African ports; (d) Boycott[] all South African goods and refrain[] from exporting goods, including all arms and ammunition, to South Africa; (e) Refus[e] landing and passage facilities to all aircraft belonging to the Government of South Africa and companies registered under the laws of South Africa . . . .

Id.

66. *See* Barnes, *supra* note 63, at 37. Nearly fifty countries threatened to boycott the Games if South Africa was included. *Id.*

67. *See* Barnes, *supra* note 63, at 38; Comprehensive Anti-Apartheid Act of 1986, H.R. Res. 4868, 99th Cong. (1986) (enacted).

68. *See* Barnes, *supra* note 63, at 39.

been marginalized by traditional political channels. Those who founded our nation and ratified our Constitution believed their boycott activities against the British were lawful, and would be shocked by the notion that the Bill of Rights did not safeguard the type of assembly and petition for redress of grievances they had used themselves.[69] The Framers of the Constitution understood boycotts to be the "one means short of armed conflict" capable of inducing the political reforms they demanded.[70] Indeed, a political boycott was in progress at the time of the Constitution's ratification;[71] to support compliance with New York's 1788 prohibition of the slave trade, John Jay and Alexander Hamilton, two of the three authors of the Federalist Papers, were leading a boycott against businessmen who participated in the slave trade.[72] By approaching and analyzing the use of political boycotts through this historical context, it will be understood that boycotts have been, and continue to be, a "means of communication valued under the First Amendment."[73]"Thus, the boycott is not a tool whose legitimacy must stand apart from the underlying structure of our governance and legal system; it is a part and parcel of our system" that must be honored and protected.[74]

B. What is the BDS Movement?[75]

Drawing upon the legacy of the international boycott movement against South Africa, Boycott, Divestment, Sanctions ("BDS") is a multi-pronged movement aimed at addressing the decades-long occupation by

69. Brief for Petitioners at 19, NAACP v. Claiborne Hardware, 458 U.S. 886 (1992) (No. 81-202).

70. *Id.*

71. Lee, *supra* note 22, at 538.

72. Brief for Petitioners at 16, *Claiborne Hardware*, 458 U.S. 886.

73. Lee, *supra* note 22, at 539.

74. *Id.* at 538–39.

75. The establishment of the modern State of Israel and the reaction to its establishment is a source of deep, emotional pain and disagreement for people of various faiths and backgrounds throughout the world. The limited scope of this note would serve no justice to the multiple perspectives on the historical events that have led to the current situation. For this reason, I have forgone the inclusion of a textual section dedicated to the background and history of the conflict itself and will attempt to include relevant factual information in footnotes when necessary. Former U.S. President Jimmy Carter—who was heavily involved in negotiations between Israel and Palestine during his presidency—offers a fair and comprehensive perspective on the political and religious history of the "Holy Land," as well as the more recent trajectory of reconciliation attempts. *See generally* JIMMY CARTER, WE CAN HAVE PEACE IN THE HOLY LAND: A PLAN THAT WILL WORK (2009) [hereinafter CARTER, WE CAN HAVE PEACE]; JIMMY CARTER, PALESTINE: PEACE NOT APARTHEID (2006) [hereinafter CARTER, PALESTINE].

Israel of Palestinian land.[76] The BDS movement was launched in 2005 by "170 Palestinian unions, political parties, refugee networks, women's organisations, professional associations, popular resistance committees and other Palestinian civil society bodies."[77] In an effort to place "non-violent pressure on Israel," the movement calls for worldwide boycotts of "Israel and Israeli and international companies that are involved in the violation of Palestinian human rights, as well as complicit Israeli sporting, cultural and academic institutions"; divestment by "banks, local councils, churches, pension funds and universities" from "all Israeli companies and from international companies involved in violating Palestinian rights"; and sanctions against Israel such as "ending military trade, free-trade agreements and expelling Israel from international forums such as the UN and FIFA."[78]

In the decade since formation, the movement has expanded throughout the world and has gained the support of several countries, organizations, and high-profile individuals.[79] The movement calls for a

76. The modern state of Israel was established by UN Resolution 181 in 1947. G.A. Res. 181 (II), Future Government of Palestine (Nov. 29, 1947). Resolution 181 called for the termination of the British Mandate for Palestine as well as the partition of the land of Palestine into independent Arab and Jewish States with Jerusalem and Bethlehem as international areas. *Id.* §§ (A)(1)–(4). Within less than a year, the fledgling nation of Israel was attacked by surrounding countries—Egypt, Syria, Jordan, and Lebanon—and emerged victorious, gaining a significant amount of territory in the process. *See* CARTER, WE CAN HAVE PEACE, *supra* note 75, at 9. The armistice line became known as the "Green Line" (or "1948 border") and was accepted as the new legal border of Israel by the international community. *Id.* In 1967, Egypt began making aggressive military maneuvers at Israel's border and signed a "mutual defense treaty with Jordan and Syria" leading Israel to launch a "preemptive attack that destroyed Egypt's air force." *Id.* at 10. Within six days Israel had gained control of and occupied the Egyptian Sinai, the Syrian Golan Heights, "Gaza, and the West Bank including East Jerusalem." *Id.* Six months later, the U.N. confirmed the "inadmissibility of the acquisition of land by force and call[ed] for Israel's withdrawal from occupied territories . . . ." *Id.*; S.C. Res. 242, ¶ 1(i) (Nov. 22, 1967) http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/242(1967). Israel continues to occupy the West Bank to this day. See CARTER, PALESTINE, *supra* note 75, at 13–14, to compare maps representing the United Nations Partition Plan of 1947 and the U.N.-approved borders of 1967. For a recent official map of Israel "integrating the occupied territories and showing no Palestinian place-names," *see* Petter Hellström, *Not on the Map: Cartographic Omission from New England to Palestine*, THE GUARDIAN (Aug. 22, 2016), https://www.theguardian.com/science/the-h-word/2016/aug/22/not-on-the-map-cartographic-omission-history.

77. Palestinian BDS National Committee, *What is BDS?*, BDS, https://bdsmovement.net/what-is-bds (last visited March 1, 2019).

78. *Id.*

79. Some of these supporters include, for example: the governments of the Netherlands, Ireland, and Sweden; South African Catholic Archbishop Desmond Tutu; Jewish Voice for Peace; the Connecticut chapter of the AFL-CIO labor union as well as The United Electrical, Radio and Machine Workers of America; and the Presbyterian Church. *See* Palestinian BDS

general boycott of Israel and, more specifically, the boycott of several companies and products that are directly tied to the occupation of Palestinian territory.[80] For example, Hewlett-Packard has become a boycott target for providing the identification system used at Israeli checkpoints throughout the occupied territories,[81] Sabra Hummus has been singled out for being produced by a company that provides financial support to the Israel Defense Forces ("IDF"),[82] and SodaStream, a maker of carbonated drink machines, has been targeted for boycott as a result of operating a factory in an illegal settlement in the West Bank.[83]

The BDS movement pledges to continue such tactics to apply "nonviolent pressure on Israel until it complies with international law by meeting three demands:"[84] (1) "[e]nding its occupation and colonization of all Arab lands and dismantling the [w]all,"[85] (2) "[r]ecognizing the

National Committee; Palestinian BDS National Committee, *Irish and Dutch Governments Join Sweden in Speaking Out for Right to Call for BDS*, BDS(May 28, 2016), https://bdsmovement.net/news/irish-and-dutch-governments-join-sweden-speaking-out-right-call-bds; *JVP Supports the BDS Movement*, JEWISH VOICE FOR PEACE, https://jewishvoiceforpeace.org/boycott-divestment-and-sanctions/jvp-supports-the-bds-movement (last visited March 1, 2019); Goodstein, *supra* note 13; Palestinian BDS National Committee, *What is BDS?*, *supra* note 77.

80. Palestinian BDS National Committee, *What is BDS?*, *supra* note 77.

81. Palestinian BDS National Committee, *Know What to Boycott*, https://bdsmovement.net/get-involved/what-to-boycott (last visited March 1, 2019).

82. *Id.*

83. *Id.* The boycott of SodaStream has been one of the more visible actions in the BDS movement. After airing a commercial featuring actress Scarlett Johannson during the 2014 NFL Super Bowl, both SodaStream and Johansson became the target of intense backlash. SodaStream's sales dropped by forty-one percent in the third quarter of 2014 and share prices dropped by around fifty percent in the ten months after the commercial. Johansson was embroiled in the controversy after being reprimanded for her involvement in the advertisement by humanitarian rights group Oxfam for which she was a "brand ambassador." Johansson eventually surrendered her role with Oxfam and SodaStream closed its factory in the West Bank and relocated within Israel proper. *See* Ishaan Tharoor, *Why Scarlett Johansson's SodaStream is Leaving the West Bank*, WASH. POST (Oct. 31, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/10/31/why-scarlett-johanssons-sodastream-is-leaving-the-west-bank/?utm_term=.b3513f62ee7a.

84. Palestinian BDS National Committee, *What is BDS?*, *supra* note 77.

85. *Id.* Over the last several decades Israel has begun the construction of a wall colloquially referred to as the "security fence," "separation barrier," or "apartheid wall." *See* CARTER, WE CAN HAVE PEACE, *supra* note 75, at 65. The wall has been built mostly in the West Bank and, in President Carter's assessment, has "become a major symbolic and practical impediment to a peace agreement." *Id.* For a map of Israel's wall and settlements in the West Bank as of 2008, see *id.* at 3. The wall was first approved by Israeli Prime Minister Yitzhak Rabin in 1992 and was intended to be constructed along recognized borders. *See id.* at 67. However, as construction began and evolved in the early 21st century, the wall pushed further into Palestinian territory and, in most places, was built "entirely in the West Bank, penetrating as much as thirteen miles into Palestinian territory to encompass existing and growing Israeli settlements and desirable land and building sites

fundamental rights of the Arab-Palestinian citizens of Israel to full equality,"[86] and (3) "[r]especting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194."[87]

not yet confiscated." *Id.* at 68. The International Court of Justice condemned the wall in a 2004 Advisory Opinion as "contrary to international law" and declared Israel was under an "obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 197-98 (July 9), http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf. A 2005 report by the United Nations noted "[t]he land between the Barrier and the Green Line constitutes some of the most fertile in the West Bank. It is currently the home for 49,400 West Bank Palestinians living in 38 villages and towns, excluding the communities in east Jerusalem." CARTER, WE CAN HAVE PEACE, *supra* note 75, at 68–69 (quoting UNISPAL, *Preliminary Analysis of the Humanitarian Implications of February 2005 Barrier Projections* (March 8, 2005), https://unispal.un.org/DPA/DPR/unispal.nsf/eed216406b50bf6485256ce10072f637/659581cf3863644f85256fbf0068c624?OpenDocument, [hereinafter UNISPAL Report]). The same report found that the projected construction route would result in about 10.1% of West Bank Land falling between the Barrier and the Green Line. UNISPAL Report, *supra*.

86. Palestinian BDS National Committee, *What is BDS?*, *supra* note 77. At the end of the war that established Israel, approximately 700,000 Palestinian "intellectuals, political and religious leaders, [and] urban elite" left the land and became refugees while Israel "found itself with 156,000 Arabs [remaining] within its borders, about 12 percent of the total population at that time." Gershon Baskin, *Close the Gap in Treatment of Israeli Arabs*, JERUSALEM POST (Jan. 16, 2013, 10:08 PM), http://www.jpost.com/Opinion/Op-Ed-Contributors/Close-the-gap-in-treatment-of-Israeli-Arabs. Those that remained were "mostly village peasants" and "Israel immediately expropriated most of their land and created security belts around all of their communities. Most of the Arab villages were without electricity, piped water systems and other basic infrastructure." *Id.* Today, more than one million Palestinians remain as citizens of Israel. *Id.* However, discrimination against them is "systemic[.][I]t is not only sociological . . . it is governmental and it penetrates almost every aspect of life which is under the mandate of the government." *Id.* For an account of one Arab-Israeli's experiences living as a minority in Israel, see Rula Jebreal, *Minority Life in Israel*, N.Y. TIMES (Oct. 27, 2014), https://www.nytimes.com/2014/10/28/opinion/rula-jebreal-minority-life-in-israel.html?_r=0.

87. Palestinian BDS National Committee, *What is BDS?*, *supra* note 77. As a result of the establishment of the modern State of Israel more than "700,000 Palestinian residents fled or were driven out," with Israeli troops subsequently barring their return and razing "about 420 Palestinian villages." CARTER, PALESTINE, *supra* note 75, at 83. This event became known among Arabs as the *naqba*, or catastrophe. *See* Hussein Ibish, *A 'Catastrophe' That Defines Palestinian Identity*, THE ATLANTIC (May 14, 2018), https://www.theatlantic.com/international/archive/2018/05/the-meaning-of-nakba-israel-palestine-1948-gaza/560294/. The ensuing decades witnessed the exacerbation of the Palestinian refugee crisis with more than 1.5 million individuals currently living in fifty-eight recognized Palestine refugee camps throughout the Arab world. *Palestine Refugees*, UNRWA, https://www.unrwa.org/palestine-refugees (last visited March 1, 2019). UN Resolution 194

II. ESTABLISHING A CONSTITUTIONAL FRAMEWORK FOR POLITICAL BOYCOTTS

A. NAACP v. Claiborne Hardware Co.[88]

NAACP v. Claiborne Hardware Co.("*Claiborne Hardware*") has been the leading case in many discussions regarding a constitutionally-protected right to boycott since the Supreme Court's decision in 1982.[89] Prior to 1982, the Supreme Court had only considered the applicability of the First Amendment to boycotts in "the context of labor disputes" and "non-economic forms of political advocacy."[90] In those cases, the Court applied a balancing test to weigh "the legitimate state concern that [a] boycott may be accompanied by economic distortion and financial blackmail" against the right of "an individual to take his business where he pleases."[91] Applying that test, the Court consistently "held that group boycotts in a business setting were illegal per se."[92]

Although the Supreme Court shifted course in *Claiborne Hardware* and extended First Amendment protections to protesting parties engaged in a political boycott, the rationale supporting that protection was not thoroughly elucidated by the Court.[93] Consequently, it has been argued that a broad First Amendment protection of political boycotts has yet to be established or properly explored by any line of Supreme Court

> [r]esolves that the [Palestinian] refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for the loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible[.]

G.A. Res. 194 (III), U.N. GAOR, 3rd Sess., at 24 (Dec. 11, 1948), https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A.

88. 458 U.S. 886 (1982).

89. *See, e.g.*, Barbara Ellen Cohen, *The Scope of First Amendment Protection for Political Boycotts: Means and Ends in First Amendment Analysis:* NAACP v. Claiborne Hardware Co., 1984 WIS. L. REV. 1273 (1984); Michael C. Harper, *The Consumer's Emerging Right to Boycott:* NAACP v. Claiborne Hardware *and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Carl B. Boyd, Jr., *Countless Free-Standing Trees: Non-Labor Boycotts After* NAACP v. Claiborne Hardware Co., 71 KY. L.J. 899 (1982).

90. *See* Cohen, *supra* note 89, at 1274.

91. George Carruthers Covington, *Constitutional Law—The First Amendment and Protest Boycotts:* NAACP v. Claiborne Hardware Co., 62 N.C. L. REV. 399,400 (1984).

92. *Id.* at 400 (citing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)).

93. *See* Cohen, *supra* note 89, at 1273 ("[A]lthough the Court properly extended first amendment protection to nonviolent political boycotts, it did so by commingling disparate strands of legal doctrine in a clumsy and confusing analysis."); Covington, supra note 91, at 405 (arguing that the Court's analysis in *Claiborne Hardware* "will not mislead the courts in future cases; it simply will not lead them at all.").

precedent.[94]However, as social justice movements and their respective calls for boycotts have proliferated in recent years,[95] the lack of definitive Supreme Court guidance on this issue necessitates an effort to understand the rationale behind the Court's decision in *Claiborne Hardware* and to identify and delineate a legal framework with which political boycott movements—and potential legislation against them—may be analyzed and adjudicated. Ultimately, despite its shortcomings, the Court's holding in *Claiborne Hardware*, in conjunction with more recent First Amendment rulings, makes it clear there is room within the sphere of First Amendment jurisprudence to establish a constitutionally-protected right to stage political boycotts and that protection can and should be extended to BDS boycotts.

1. Background

The political boycott movement at issue in *Claiborne* emerged during the Civil Rights movements of the 1960s.[96] In the mid-1960s, the NAACP established a chapter in Claiborne County, Mississippi that conducted weekly community meetings to address the system of segregation and discrimination prevalent in Port Gibson[97] and Claiborne County.[98] At the same time, black members of the community put forward a "petition for redress of grievances to civic and business leaders of the white community."[99] A biracial committee was organized to respond to the

94. Harper, *supra* note 89, at 413.

95. *See, e.g.*, John Kell, *Anti-Trump Boycott Targets Retailers That Sell Trump-Branded Products*, FORTUNE (Nov. 14, 2016),) http://fortune.com/2016/11/14/boycott-targets-trump-retailers ("calling for shoppers to avoid supporting retailers that sell Trump-branded products" and companies that have been supportive of Trump's presidency); Ko Bragg, *'Black Dollars Matter': Bank-Ins May Be The Way to Empowerment*, NBC NEWS (July 20, 2016, 3:16 PM), http://www.nbcnews.com/news/nbcblk/black-dollars-matter-bank-ins-may-be-way-empowerment-n607231 (discussing recent calls by black activists for "nationwide organized boycotts of major banks and retailers" in protest over police-involved deaths of black men); Richard Fausset & Alan Blinder, *Rights Law Deepens Political Rifts in North Carolina*, N.Y. TIMES (Apr. 11, 2016) http://www.nytimes.com/2016/04/12/us/rights-law-deepens-political-rifts-in-north-carolina.html?_r=0 (discussing boycotts in North Carolina in response to state legislation restricting transgender bathroom use); Cadie Thompson, *Occupy Wall Street Backs a Nationwide Boycott Against Banks*, CNBC (Oct. 7, 2011, 1:21 AM), http://www.cnbc.com/id/44800021 (discussing calls for boycotts of major banking institutions and a national "Bank Transfer Day").

96. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 889 (1982).

97. *See id.* "Port Gibson [was] the county seat and largest municipality in Claiborne County." *Id.* at 889 n.2.

98. *Id.* at 898.

99. *Id.*

black community's grievances, but the committee failed to produce positive results.[100]

After several unsuccessful meetings, black members of the biracial committee prepared a further petition entitled "Demands for Racial Justice" which was presented at the local NAACP meeting in early March 1966.[101] The petition detailed nineteen specific demands of the black community including calls for

> the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty . . . and an end to verbal abuse by law enforcement officers. It stated that "Negroes are not to be addressed by terms as 'boy,"girl,"shine,"uncle,' or any other offensive term, but as 'Mr.,"Mrs.,' or 'Miss,' as is the case with other citizens.[102]

The petition was approved unanimously by the approximately 500 people present at the chapter meeting and on March 14, 1966 it was presented to public officials of the local communities.[103] However, the white residents did not respond favorably to the petition's demands and on April 1, 1966 the NAACP held another meeting where several hundred members of the black community unanimously voted to boycott the white merchants of Port Gibson and Claiborne County.[104]

The boycott was effective immediately and took various forms including picketing and marching in front of targeted white businesses.[105] The vast majority of the black community participated in the boycott and were supported by community groups such as Mississippi Action for Progress ("MAP"), a community action program that used federal funds to purchase food for children.[106] Leaders of the boycott movement repeatedly encouraged others to join the cause through

100. *See id.*at 898, 900.
101. *Id.* at 898–99.
102. *Id.* at 899.
103. *Id.*
104. *Id.* at 900.
105. *Id.* at 903.
106. *Id.* at 900–01. MAP's support of the boycott and decision to purchase food exclusively from black-owned stores was especially devastating to the white merchants because of the substantial quantities of food it purchased. *Id.*at 901. The group's voluntary participation in the boycott is significant because, even as a corporate recipient of government funding, the Supreme Court specifically held that its activities differed from boycotts organized for economic ends and were "entitled to the protection of the First Amendment." *Id.* at 915. This protection, therefore, can and should be extended to corporate participants in the BDS movement, who have no economic interest in the boycott of Israel.

speeches and personal solicitation.[107] Although the practices "used to encourage support for the boycott were uniformly peaceful and orderly," some more forceful approaches were also employed.[108] The boycott was enforced by an organized group known as the "Deacons" or "Black Hats" who stood outside targeted businesses and identified those who traded with the boycotted merchants.[109] Those who continued to trade with such businesses had their names read at NAACP meetings and published in a local paper.[110] Boycott violators were occasionally subject to threats, social ostracism, and, in some instances, violence.[111] The resulting success of the boycotts led several targeted merchants in 1969 to file suit in state court to enjoin the boycott and recover damages from 146 individuals, the NAACP, and MAP.[112]

After an eight-month equity trial, the trial court chancellor held that 130 defendants (including the NAACP and MAP) were jointly and severally liable on three separate conspiracy theories.[113] The trial court found that the defendants committed the tort of malicious interference with business, violated state statutory prohibitions against secondary boycotts,[114] and violated state antitrust statutes by "divert[ing] black patronage from the white merchants to black merchants . . . thus unreasonably limiting competition between black and white merchants. . . ."[115] The trial court's finding that the boycott involved threats, intimidation, and instances of violence was a key factor in its

107. *Id.* at 909.
108. *Id.* at 903.
109. *Id.*
110. *Id.*at 903-04.
111. *Id.* at 904. Ten incidents of violence were specifically identified in relation to the boycott. *Id.* In some incidents, shots were fired at the homes of non-boycotters; other incidents involved bricks and bottles being thrown or boycott violators being physically assaulted. *Id.* at 904–05. Charles Evers, the Field Secretary of the NAACP was also reported to have threatened: "If we catch any of you going in any of them racist stores, we're gonna [sic] break your damn neck." *Id.* at 899, 902.
112. *Id.* at 889–90.
113. *Id.* at 890–91.
114. *Id.* at 891.A secondary boycott has been described as "a combination to influence *A* by exerting economic or social pressure against persons with whom *A* deals. It has been put more succinctly as 'a combination to harm one person by coercing others to harm him.'" Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 907 (2005) (quoting DUANE MCCRACKEN, STRIKE INJUNCTIONS IN THE NEW SOUTH 13 (1931)).
115. *Claiborne Hardware*, 458 U.S. at 892.

judgment of illegality.[116] The chancellor imposed damage liability and entered a broad permanent injunction against the boycotters.[117]

In December 1980, the Mississippi Supreme Court reversed significant portions of the trial court's judgment.[118] The State Supreme Court held the secondary boycott statute inapplicable, and declined to rely on the State's restraint of trade statute, "noting that the 'United States Supreme Court has seen fit to hold boycotts to achieve political ends are not a violation of the Sherman Act, after which our statute is patterned.'"[119] However, the State Supreme Court upheld liability on the common law tort theory of malicious interference citing the use of physical force, violence, intimidation, and the stationing of the "Deacons" or "Black Hats" in the area of white-owned businesses to force and compel members of the black community to withhold their trade from the targeted merchants.[120] The court concluded that, despite the First Amendment, "[i]f any of these factors[—]force, violence, or threats[—]is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other."[121] The United States Supreme Court granted a petition for certiorari.[122]

2. The United States Supreme Court Decision

In a unanimous decision, the United States Supreme Court reversed the Mississippi Supreme Court, noting the presence of only "isolated acts of violence."[123] Justice Stevens, writing for the majority, distinguished the core elements[124] of the boycott—an agreement by black citizens to

116. *Id.* at 894.

117. *Id.* at 893. The chancellor permanently enjoined petitioners from stationing "store watchers" at the respondents' business premises; from "persuading" any person to withhold his patronage from respondents; from "using demeaning and obscene language to or about any person" because that person continued to patronize the respondents; from "picketing or patrolling" the premises of any of the respondents; and from using violence against any person or inflicting damage to any real or personal property. *Id.*

118. *Id.* at 894.

119. *Id.* (quoting NAACP v. Claiborne Hardware Co., 393 So. 2d 1290, 1301 (Miss. 1980) (internal citation omitted)).

120. *Claiborne Hardware*, 458 U.S. at 894.

121. *Claiborne Hardware*, 393 So.2d at 1301.

122. *Claiborne Hardware*, 458 U.S. at 896.

123. *Id.* at 924. Justice Stevens wrote the opinion for seven Justices, Justice Rehnquist concurred in the judgment, and Justice Marshall did not take part in the consideration or decision of the case. *Id.* at 888–934.

124. The core elements included an agreement by black citizens to boycott white merchants with the purpose of "secur[ing] compliance by both civic and business leaders" with the boycotters' list of demands for equality and racial justice, and the support of that

boycott white merchants and the support of that agreement through speeches, nonviolent picketing, and encouragement of others to join the movement—from its violent elements and concluded that the core elements were forms of speech, assembly, association, and petition "entitled to protection under the First and Fourteenth Amendments."[125] "In sum, the boycott clearly involved constitutionally protected activity. . . . Through exercise of these First Amendment rights . . . rather than through riot or revolution," "petitioners sought to bring about political, social, and economic change" and "sought to change a social order that had consistently treated them as second-class citizens."[126] The Court's recognition of the boycott as an effort to change the political and social order thus differentiated the *Claiborne Hardware* boycott from an economic boycott, deeming it worthy of constitutional protection under the First Amendment.[127]

Although the Court recognized the States' broad power "to regulate economic activity, a right that is likely to suffice when a state seeks to limit economic boycotts or expressly anti-competitive conduct,"[128] it"[did] not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case."[129] "The real complaint over the boycott in the current day does not rest on a question over its status as expressive activity under the First Amendment, but rather the complaint is one borne out of the speech's impacts, which is not an appropriate ground for distinction under the Constitution."[130]

B. The Applicability of Claiborne Hardware to BDS Boycotts

Marc Greendorfer, in his article *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*,[131] argues that the Court's protection of the *Claiborne Hardware* boycott was only applicable to boycotts undertaken in an effort to protect existent constitutional

agreement through speeches, nonviolent picketing, and encouragement of others to join the movement. *Id.* at 907.

125. *Id.* First Amendment freedoms "are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States." Gitlow v. New York, 268 U.S. 652, 666 (1925) (internal quotation omitted).

126. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911–12 (1982).

127. *See* Lee, *supra* note 22, at 546–47.

128. *Id.*at 547 n.98.

129. *Claiborne Hardware*, 458 U.S. at 913.

130. Lee, *supra* note 22, at 547.

131. Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112 (2016).

rights and should not be extended any further.[132]Greendorfer draws this conclusion from the Court's statement:

> Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.[133]

Greendorfer's interpretation of the Court's holding in *Claiborne Hardware* is summarized as a First Amendment right of U.S. "citizens to engage in a boycott of certain local commercial enterprises controlled by civic leaders who are violating enumerated constitutional and statutory rights of the boycotters."[134] However, this interpretation is unduly limiting and is a radical extrapolation in light of the *Claiborne* court's ruling and subsequent First Amendment jurisprudence. Admittedly, courts and commentators *have* traditionally afforded "greater protection to political boycotts seeking to further values expressed somewhere in the Constitution or in the statutory law, such as a boycott against racial discrimination,"[135] yet that was never an absolute test for the constitutionality of political boycotts.[136] Indeed, those same courts and commentators have consistently relied on a "form of policy balancing" in determining the "status of boycott activity under the first amendment [sic]."[137] Such case-by-case balancing, though imperfect,[138] implicitly leaves space in First Amendment jurisprudence for political boycotts that "communicat[e] a message about which the law is indifferent, such as [for example] the withholding of patronage from stores which sell salacious,

132. *Id.* at 115 ("The Supreme Court recognized First Amendment protection for the boycotters because the activity was undertaken on a local level by those directly affected by flagrant violations of enumerated constitutional protections and federal laws, and because the boycott was directed at the local perpetrators of the violations.").

133. *Id.* (quoting *Claiborne Hardware*, 458 U.S. at 914). Greendorfer's argument seems to suggest that a political boycott would only be protected if it was targeted against activities that violated the constitutional rights of boycotters. Such an approach conflates the analysis of whether *a political boycott itself* is constitutional and whether *the underlying reason for the boycott* is a violation of boycotters' constitutional rights.

134. *Greendorfer*, *supra* note 131, at 116.

135. *Political Boycott Activity and the First Amendment*, *supra* note 21, at 661.

136. *Id.* (citing the "unstructured and ad hoc form of policy balancing" taken by courts).

137. *Id.*

138. Such balancing "will often . . . subject both the boycotter and the boycotted to the ideological sympathies of a particular court and, perhaps, of a particular era." *Id.* at 662.

but not obscene, magazines"[139] or, as discussed here, the withholding of patronage from establishments that support the Israeli occupation of Palestinian territory.[140] This approach was unchanged by the decision in *Claiborne Hardware* and it is the applicable standard when analyzing political boycott cases under the First Amendment.[141] Our ambition, therefore, must be to refine and delineate the Court's opinion in *Claiborne Hardware*—not discard it completely.

Unsatisfied, Greendorfer argues that the correct framework for analyzing BDS boycotts—boycotts that are political in nature but not tied to any particular right guaranteed by the Constitution—is *not* to be found within *Claiborne Hardware* but instead to be found in the Supreme Court opinion of the same term, *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.* ("*International Longshoremen*").[142] However, even if one were to concede, for argument's sake, that *Claiborne Hardware* did not establish an adequate framework for analyzing BDS boycotts, the Court's decision in *International Longshoremen* is certainly not the solution. In fact, the *International Longshoremen* decision may easily be interpreted to strengthen the argument in favor of constitutional protection for political boycotts such as BDS.

International Longshoremen dealt with a labor union-organized boycott against an American import company due to the importer's continuation of certain types of business with the Soviet Union.[143] The Court found the boycott to be in violation of Section 8(b)(4) of the National Labor Relations Act (NLRA)[144] and "rejected the claim that secondary

139. *Id.* at 661.

140. *See* discussion *infra* Part IV.

141. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982) ("We consider first whether petitioners' activities are protected in any respect by the Federal Constitution and, if they are, what effect such a protection has on a lawsuit of *this* nature.") (emphasis added).

142. Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212 (1982); Greendorfer, *supra* note131, at 117–18*; see also* Gordon M. Orloff, *The Political Boycott: An Unprivileged Form of Expression*, 1983 DUKE L.J. 1076, 1089–91.

143. The International Longshoremen's Association was boycotting in response to the Soviet Union's invasion of Afghanistan. Greendorfer, *supra* note 131, at 118. Although the United States had already implemented "a series of boycott and embargo actions [against the Soviet Union] including prohibitions on the sale of certain goods to the Soviet Union," some goods were exempted from the prohibition. *Id.* The International Longshoremen's Association "unilaterally expanded the embargo and instituted a blanket boycott on the handling of any and all cargo from the Soviet Union" which disrupted the importer's business completely. *Id.* (citing *Int'l Longshoremen*, 456 U.S. at 214).

144. 29 U.S.C. § 158(b)(4)(i)–(ii) (2012)

> It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage any individual . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to

picketing by labor unions in violation of section8(b)(4) is protected activity under the First Amendment."[145] However, the Court's analysis made it clear that *International Longshoremen* was a case about labor law under the NLRA, rather than a case about individual rights or the boycott of foreign entities.[146] This distinction helps to explain the "doctrinal dissonance" produced by the Court's varying treatment of boycott cases in varied contexts.[147] A comparison of the Court's decisions in three boycott cases dealing with labor, antitrust, and civil rights boycotts[148] makes it clear "that secondary boycotts seeking political objectives are protected from governmental regulation *unless a labor union is involved or unless the boycott is for the purpose of advancing the participants' own economic self-interest*."[149] Labor union boycotts have consistently "been analyzed differently than boycotts of business or civil rights groups"[150] and, although *Claiborne Hardware* has its imperfections, it is clear that *International Longshoremen* is not a fitting precedent with which to analyze the First Amendment status of BDS boycotts.[151]

> perform any services; or . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, ...

145. *Int'l Longshoremen*, 456 U.S. at 226.

146. *See* Lee, *supra* note 22, at 569 (quoting *Int'l Longshoremen*, 456 U.S. at 227–28) ("[*International Longshoremen*] itself recognized that since a labor boycott was at issue, the case was operating within an already existing framework reflecting 'a careful balancing of interests,' and it was not for the Court to create an exception . . . .").

147. *See* Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807, 812 (1993).

148. *See id.* Professor Gary Minda compares the differing results by the Supreme Court in *International Longshoremen*, 456 U.S. 212 (analyzing boycotts in a labor context);*FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) (analyzing boycotts in an antitrust context); and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (analyzing boycotts in a civil rights context).

149. *Id.* at 813 (emphasis added).

150. *Id.*

151. Greendorfer also makes the argument that BDS boycotts can be legitimately proscribed by the U.S. Export Administration Act which allows the U.S. government to "prohibit[ ] any United States person . . . from taking or knowingly agreeing to take any of the [listed] actions with intent to comply with, further, or support any boycott fostered or imposed *by a foreign country* against a country which is friendly to the United States. . . ." 50 U.S.C. § 4607(a)(1) (2012) (emphasis added); *see* Greendorfer, *supra* note 131, at 119–22. However, BDS boycotts are not "imposed by a foreign country" and, accordingly, it requires a great deal of extrapolation to arrive at Greendorfer's conclusion.

C. Government Funding and Unconstitutional Conditions

State anti-BDS bills and legislation have been heavily reliant on the withholding of state funding and benefits, such as state contracts, from organizations engaged in the BDS movement.[152] This approach allows legislators to avoid directly prohibiting support for BDS while providing them with the tools to effectively weaken the movement by threatening its pool of supporters with funding cuts and job losses.[153] New York Governor Andrew Cuomo, in an editorial defending his anti-BDS executive order, wrote:

> "[A]s a matter of law, there is a fundamental difference between a state suppressing free speech and a state simply choosing how to spend its dollars. To argue otherwise would be to suggest that [states are] constitutionally obligated to support the BDS movement, which is not only irrational but also has no basis in law."[154]

Such an argument is grounded in the proposition that when the government is spending money, it is empowered to set parameters and objectives that may incidentally restrict the speech of the recipients of those funds.[155] While this proposition is not necessarily incorrect—

152. *See, e.g.*, Cuomo, *supra* note 9 (withholding state funding and investments from institutions and companies engaged in the BDS movement); *South Carolina Note*, *supra* note 5, at 2030–31 (withholding state contracts from businesses engaging in BDS).

153. Such an approach naturally raises a question: if legislators truly believe BDS activities are not First Amendment-protected free speech, why do they not take direct legal action against those activities without intermediary threats, i.e. withdrawal of state funding or benefits? *Cf.* Fuhr, *supra* note 18, at 98–99 ("Since the government cannot directly limit an individual's constitutional rights absent compelling reasons, why should the government be allowed to do so indirectly by granting a government benefit only upon the waiver of a constitutional right?").

154. Cuomo, *supra* note 9. Interestingly, by setting forth this distinction between "suppressing free speech" and "simply choosing how to spend" dollars, Governor Cuomo is implicitly acknowledging that BDS activities *are* protected under the First Amendment. The acknowledgement of the constitutionally-protected status of BDS activities serves as the platform to analyze anti-BDS restrictions through the unconstitutional conditions doctrine and thus cuts against arguments in favor of anti-BDS restrictions as demonstrated in the discussion, *infra*, of unconstitutional conditions.

155. Alternatively, it may be argued that states' anti-BDS restrictions on expenditures should not be considered within the paradigm of government spending and unconstitutional conditions, which focuses on the constitutionality of government's use of funds to encourage or discourage certain types of speech by participants in government-funded programs. Instead, anti-BDS bills and legislation should be considered a form of "government speech" which "'is exempt from First Amendment scrutiny,' even when it has the effect of limiting private speech." Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L.

governments can enforce certain speech-related restrictions on expenditures[156]—the difference between a state "suppressing free speech" and "choosing how to spend its dollars" is not as clear-cut as proponents of anti-BDS legislation may contend. Indeed, limits on speech-related restrictions on government expenditures *do* have a "basis in law" and have been the subject of multiple Supreme Court decisions and scholarly discussions, which have generated the doctrine of "unconstitutional conditions."[157]

The doctrine of unconstitutional conditions formed during the *Lochner* era[158] of the early twentieth century.[159] The doctrine holds that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, *even if the government may withhold that benefit altogether*."[160] It is an assertion of the principle "that government may not do indirectly what it may not do directly" in contradiction to the "view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt."[161] The doctrine is implicated when a government offers benefits it is permitted—

Rev. 695, 695 (2011) (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005)). Under the relatively modern government speech doctrine, Professor Blocher suggests "the government may be able to restrict private expression 'because of its message, its ideas, its subject matter, or its content,' so long as in so doing it is expressing its own viewpoint." *Id.* at 696 (quoting Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972)). Professor Blocher cites the example of the Supreme Court's decision in Pleasant Grove City v. Summum, 555 U.S. 460 (2009). *Id.* In *Summum*, "a religious order . . . sought to erect a monument in a public park that already contained other privately donated monuments." *Id.* at 697 (citing *Summum*, 555 U.S. at 464–65). The city rejected the monument, arguing the monument "was not consistent with the city's purported message of celebrating local history and community" and its rejection was a form of government speech. *Id.* (citing *Summum*, 555 U.S. at 465). The Court agreed that the city's decision was a form of government speech and thus was "not subject to the Free Speech Clause . . . ." *Id.* (quoting *Summum*, 555 U.S. at 481). Professor Blocher cites this case as an example of the government speech doctrine "allow[ing] what had previously been thought forbidden: the burdening, even if not silencing, of private viewpoints *because* the government disagrees with them." *Id.* Of course, the expansion of such a doctrine conflicts with "another apparently absolute First Amendment principle—the requirement that the government be viewpoint neutral when it restricts private speech," *id.* at 696, and the remainder of Blocher's article is dedicated to exploring the natural conflict between the two. *See id.* at 741–42 for a brief discussion of the interaction between "government speech" doctrine and "unconstitutional conditions" doctrine.

156. *See*, *e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991) discussed *infra* notes 170—90 and accompanying text regarding conditions on government funding.

157. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989).

158. Referring to the landmark case of Lochner v. New York, 198 U.S. 45 (1905).

159. *See* Sullivan, *supra* note 157, at 1416.

160. *Id.* at 1415 (emphasis added).

161. *Id.*

but not necessarily compelled—to provide, but on the condition that recipients "perform or forego an activity that a preferred constitutional right normally protects from government interference."[162] In contrast, the doctrine is not implicated if the benefit offered is one that the government is prohibited to offer[163] or one that the government is obligated to provide unconditionally.[164]

The doctrine was adopted by a majority of the Supreme Court in 1926 in *Frost & Frost Trucking Co. v. Railroad Commission*.[165] In *Frost* the Court held that, although states possessed the power to prohibit use of its public highways, the states could not condition the use of its highways on the requirement that a private trucker become a common carrier.[166] To do so would be to indirectly compel what the state could not directly compel under the Constitution.[167] The Court thus recognized that "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."[168] Accordingly, the Court deemed it "inconceivable that guaranties [sic] embedded in the Constitution . . . may thus be manipulated out of existence."[169] As the doctrine evolved in the Supreme Court, it was expanded to protect "liberties of speech, association, religion, and privacy."[170]

162. *Id.* at 1421–22. A preferred constitutional right is a recognized right that is "normally protected by strict judicial review." *Id.* at 1427.

163. Professor Sullivan gives the example of a government paying to have a citizen assassinated, which would be wholly unconstitutional on other grounds. *Id.* at 1422.

164. *Id.*

165. *See* Frost v. R.R. Comm'n, 271 U.S. 583, 594 (1926).

166. *Id.* at 599.

167. *See id.* at 594.

168. *Id.*

169. *Id.*

170. Sullivan, *supra* note 157, at 1416. The modern era of the unconstitutional conditions doctrine began in the late 1950s with the Supreme Court's rejection of a condition on a California property tax exemption requiring recipients to declare under oath that they do "not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostilities." Speiser v. Randall, 357 U.S. 513, 515, 528–29 (1958). The doctrine was particularly expanded and defined in the period between the 1960s through the 1980s. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (stating that, by denying state benefits to a person who refused to work on her Sabbath, South Carolina was forcing "her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."); Keyishian v. Bd. of Regents, 385 U.S. 589, 589 (1967) (invalidating New York statutes barring employment on the basis of membership in "subversive" organizations); Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968) (holding teachers may not be compelled to relinquish their First Amendment rights to comment on matters of public interest as a condition of employment); Perry v.

Despite the Supreme Court's historical embrace of the unconstitutional conditions doctrine, the Court made a significant shift in the early 1990s with the landmark decision of *Rust v. Sullivan*.[171] In *Rust*, the Supreme Court upheld Title X of the Public Health Service Act authorizing the Secretary of Health and Human Services ("HHS") to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services."[172] However, the range of family planning methods considered "acceptable and effective" under the Act did not include abortion.[173] Section 1008 of the Act specifically declared that "[n]one of the funds appropriated" under the Act were to be used in programs where abortion was a method of family planning.[174] Regulations of the program attached three principal conditions on federal funds for projects under Title X.[175]

First, projects receiving Title X funds were not permitted to "provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning."[176] Because Title X was limited to serving individuals prior to conception, the program did not provide services related to childbirth and would only provide information to pregnant women in the form of a referral out of the Title X program.[177] However, when making such referrals, the program prohibited the referral of a pregnant woman to an abortion provider, even if specifically requested.[178] The regulation went so far as to suggest an appropriate response: "the project does not consider

Sindermann, 408 U.S. 593, 597 (1972) (holding that a professor was denied due process when his employment contract was not renewed in retaliation for his criticism of the Regents of the college. The Court specifically noted that the government may not deny benefits on a "basis that infringes . . . freedom of speech. For if the government could deny a benefit . . . because of. . . constitutionally protected speech or associations, . . . exercise of those freedoms would in effect be penalized and inhibited."); Elrod v. Burns, 427 U.S. 347 (1976) (holding that a sheriff could not terminate the employment of non-civil service officers in his department solely for their contrary political beliefs); FCC v. League of Women Voters of California, 468 U.S. 364 (1984) (prohibiting the conditioning of public broadcasting subsidies on abstinence from editorializing).

171. 500 U.S. 173 (1991). Chief Justice William Rehnquist authored the five-justice majority opinion. Justices Blackmun, Stevens, and O'Connor dissented.

172. 42 U.S.C. § 300(a) (2012).

173. *Rust*, 500 U.S. at 178.

174. 42 U.S.C. § 300a-6 (2012).

175. *Rust*, 500 U.S. at 179.

176. *Id.* at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)).

177. *Id.*

178. *Id.* at 180.

abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."[179]

Second, Title X projects were prohibited from engaging in activities that "encourage[d], promote[d] or advocate[d] abortion as a method of family planning."[180] Such activities included, *inter alia*, "lobbying for legislation to increase the availability of abortion," distributing "materials advocating for abortion," and paying dues to groups that advocated abortion "as a substantial part of its activities."[181] Third, Title X projects were to be organized "so that they [were] 'physically and financially separate' from prohibited abortion activities."[182]

After the regulations were promulgated, but before they were applied, grantees and doctors ("petitioners") who supervised Title X funds challenged the facial validity of the regulations on the grounds that the First Amendment rights of Title X clients[183] as well as the First Amendment rights of Title X health providers were being violated.[184] The District Court rejected the statutory and constitutional challenges to the regulations and granted summary judgment in favor of the Secretary.[185] A Second Circuit panel affirmed the District Court's decision and determined the regulations legitimately effectuated congressional intent and found that the "decision not to fund abortion counseling, referral or advocacy . . . does not . . . constitute a facial violation of the First Amendment rights of health care providers or of women."[186] The panel explained that based on the Supreme Court's ruling in *Regan v. Taxation with Representation of Washington*,[187]the "government need not subsidize the exercise of fundamental rights," including "speech rights."[188]

Upon reaching the Supreme Court, the petitioners argued that the regulations impermissibly imposed viewpoint-discriminatory conditions on government subsidies by prohibiting "all discussion about abortion as a lawful option" and compelling clinics and counselors to provide

179. *Id.* (quoting 42 C.F.R. § 59.8(b)(5) (1989)).
180. *Id.* (citing 42 C.F.R. § 59.10(a) (1989)).
181. *Id.*
182. *Id.* (quoting 42 C.F.R. § 59.9 (1989)).
183. It was also argued that the regulations were not authorized by Title X and that they violated the Fifth Amendment rights of the clients. *Id.* at 181. These arguments will not be addressed in this note.
184. *Id.*
185. *Id.*; New York v. Bowen, 690 F. Supp. 1261, 1274 (S.D.N.Y. 1988).
186. New York v. Sullivan, 889 F.2d 401, 412 (2d Cir. 1989).
187. 461 U.S. 540 (1983).
188. *Id.*; *Sullivan*, 889 F.2d at 412 (citing Regan v. Taxation with Representation of Washington, 461 U.S. 540, 545 (1983)).

information promoting the continuation of pregnancies to term.[189] The petitioners further asserted that, while the government may place certain conditions on the receipt of subsidies, it may not "discriminate invidiously" with the goal of suppressing dangerous ideas.[190] In addressing these arguments, the Supreme Court adopted the stance that the government was properly exercising its authority to subsidize family planning services which lead to conception and childbirth, while declining to promote or encourage abortion.[191] By selectively funding a program to encourage activities believed to be in the public interest while refusing to fund alternative programs dealing with the problem in a different way, the government was "*not* [discriminating] on the basis of viewpoint"—it was merely choosing to "fund one activity to the exclusion of the other."[192] In language strikingly similar to Governor Cuomo's defense of New York's anti-BDS executive order,[193] the Supreme Court reiterated "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[194]

Supporters of anti-BDS bills and legislation may surmise that the Supreme Court's decision in *Rust* provides judicial support for the conditional-funding approach taken by several states.[195] Some have taken at face value the Court's statement that a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the

189. *Rust*, 500 U.S. at 192 (quoting Brief for Petitioner at 11 (No. 89-1391)).

190. *Rust*, 500 U.S.at 208 (quoting *Regan*, 461 U.S. at 548).

191. *Id.* at 192–93. The *Rust* Court drew this authority from its decision in *Maher v. Roe*, 432 U.S. 464 (1977). In *Maher*, the Court ruled that a state welfare regulation which offered payments to Medicaid recipients for services related to childbirth but not for non-therapeutic abortions was a constitutional "value judgment favoring childbirth over abortion." 432 U.S. at 474.

192. *Rust*, 500 U.S. at 193.

193. *See* Cuomo, *supra* note 9 ("As a matter of law, there is a fundamental difference between a state suppressing free speech and a state simply choosing how to spend its dollars. To argue otherwise would be to suggest that [states are] constitutionally obligated to support the BDS movement, which is not only irrational but also has no basis in law."); *supra* notes 155—56 and accompanying text.

194. *Rust*, 500 U.S. at 193 (quoting *Maher*, 432 U.S. at 475). The Court also addressed the argument that such conditions were akin to a "penalty" by stating: "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Rust*, 500 U.S. at 193 (quoting Harris v. McRae, 448 U.S. 297, 317 n.19 (1980)).

195. As Professor David Cole explains it: "[a]t first reading, *Rust* appears to support the . . . position that government is free to restrict speech whenever it is footing the bill." David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 678 (1992).

right."[196] In some ways, the Court's ruling is simply a logical extension of a *laissez-faire* belief that any burden on constitutional rights is "just what the beneficiary bargained for."[197] However, a closer look at the Court's analysis of the issues provides insight into why the Court permitted such restrictions in *Rust* and why proposed BDS restrictions explicitly fall outside the bounds of the government's power to regulate speech as expressed by the *Rust* decision.

In upholding the Title X regulations, the Court emphasized that the regulations were merely "designed to ensure that the limits of the federal program" were observed.[198] Title X was solely designed to encourage family planning, and not prenatal care.[199] Accordingly, a doctor could "properly be prohibited" from providing prenatal care to a project patient because "such service [was] outside the scope of the federally funded program."[200] However, the Court's explanation of its holding explicitly foreclosed the notion that *Rust* provides judicial precedence for the type of broad restrictions seen in anti-BDS measures proposed and passed throughout the country.

Chief Justice Rehnquist qualified the constitutionality of the regulations by explaining, "Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes."[201] Accordingly, "[t]he Secretary's regulations [did]

196. *Rust*, 500 U.S. at 193 (quoting Regan v. Taxation with Representation of Washington, 461 U.S. 540, 549 (1983)); *see also* Mort Klein & Liz Berney, *Why Does the ADL Continue to Hinder Anti-BDS Efforts?*, MATZAV (June 30, 2016 6:43 AM), http://matzav.com/why-does-the-adl-continue-to-hinder-anti-bds-efforts; Alamea Deedee Bitran, *"Anti-Israel," a Camouflage Platform for "Anti-Semitism:" Anti-BDS Legislation is Wholly Constitutional*, NAT'L L. REV. (May 19, 2016), http://www.natlawreview.com/article/anti-israel-camouflage-platform-anti-semitism-anti-bds-legislation-wholly#_ftnref71 (quoting this statement directly five times in support of the proposition that anti-BDS legislation is "wholly constitutional").

197. Sullivan, *supra* note 157, at 1417. This perspective was tersely expressed by Nabers Cabbanis, a Health and Human Services official who supervised the family-planning clinics: "If you don't like our rules, you don't have to receive our funds." NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE 92 (1992).

198. *Rust*, 500 U.S. at 193.

199. *Id.*

200. *Id.* The Court rejected the notion that, by refusing to fund alternatives, the regulations were a form of viewpoint-discrimination. The regulations were compared to Congress' establishment of the National Endowment for Democracy which encouraged other countries to "adopt democratic principles"; the funding of that program did not create a constitutional obligation upon the government to fund parallel programs encouraging communism and fascism. *Id.* at 194.

201. *Id.* at 196.

not force the Title X grantee to give up abortion-related speech."[202] The Court approved the Title X regulations only to the extent the regulations governed the "scope of the Title X *project's* activities."[203] In contrast, Title X *grantees* were left unfettered in their other activities and could "continue to perform abortions, provide abortion-related services, and engage in abortion advocacy."[204] Grantees were merely required to conduct those activities independent from a Title X funded project.[205] Such regulations, the Court clarified, were distinguished from regulations in "which the Government ha[d] placed a condition on the *recipient* of the subsidy rather than on a particular program or service" which would "effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the . . . funded program."[206] It is precisely this distinction that places many anti-BDS bills and laws outside the bounds of permissible funding restrictions.[207] States have made, and acted upon, broad threats to withhold financial benefits from individuals and organizations engaged generally in BDS activities and thus have not limited funding restrictions within the narrow scope of a funded project as would be acceptable under *Rust*. Current and proposed laws have rendered those engaged in BDS activity ineligible for state funding and benefits regardless of the nature of the engagement in relation to the withheld funding or benefit.[208] Under such legislation, a superbly qualified building contractor, for example, would be blacklisted from any state contracts as a result of his completely unrelated engagement in BDS activities.[209] Such scenarios fall squarely into the

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 197. Professor Cole explains: "a requirement that one not teach French with a grant awarded to teach English would not amount to an unconstitutional condition. However, if the government conditions a grant to teach English on the recipient's pledge not to teach French even on her own time, the condition would be unconstitutional." Cole, *supra* note 195, at 685.
207. "The doctrinal focus [of the unconstitutional conditions doctrine] is on the pressure that the dangling of a financial benefit places on the would-be recipient's freedoms outside the funded program. The doctrine's corollary is that if the conditions do not restrict the recipient on her own time, no constitutional issue is raised." Cole, *supra* note 195, at 680.
208. Eugene Kontorovich, *Can States Fund BDS?*, TABLET (July 13, 2015 12:00 AM), http://www.tabletmag.com/jewish-news-and-politics/192110/can-states-fund-bds.
209. It has been argued that states can reasonably decide that companies that boycott Israel for political reasons are less effective and harmful to contract performance because such companies "may fail to use the best subcontractors, products, or partners . . . and thus simply do a worse job." *Id.* However, it is unclear why specific legislation is needed to address such concerns; if a contractor presents high bids or performs below standards, a

category the Court admonished as conditions "on the *recipient*" of state benefits which effectively prohibit the "recipient from engaging in the protected conduct outside the scope of the . . . funded program."[210]

Such an understanding of *Rust* comports with a framework that analyzes the "germaneness" of conditions on receipt of government benefits.[211] This framework argues that the less germane a condition is to a benefit, the "more like manipulation or extortion" it is.[212] "The more germane a condition to a benefit, the more deferential the review; nongermane conditions, in contrast, are suspect."[213] In order for a benefit that requires a "conditional surrender of a constitutional right to be acceptable, there must be a substantial relationship between the forfeiture of the . . . right . . . and the asserted governmental interest in imposing the condition."[214] Similarly, other forms of analysis question whether the condition is so irrelevant to the benefit that states would still provide the benefit even if they were prohibited from imposing the condition.[215] States that would continue to provide the benefit even if they could not impose the condition are seen as "exploiting the particular need of the recipient rather than advancing a public interest."[216] Thus, those states would be presumed to have attached such conditions in order to pressure recipients not to exercise their constitutional rights.[217]

Applying this framework, it is difficult to envision how recent anti-BDS bills and legislation would survive constitutional scrutiny. States proposing the withdrawal of contracts and financial benefits from those engaged in the BDS movement are placing restrictive conditions wholly unrelated to the benefits they are offering. No "substantial relationship" exists between the forfeiture of the constitutional right to boycott a foreign country and a state's asserted interest in placing such a condition

state may freely refuse to hire that contractor simply because that contractor is a bad choice.

210. *Rust*, 500 U.S. at 197.

211. *See* Fuhr, *supra* note 18, at 104–06; Sullivan, *supra* note 157, at 1458.

212. Sullivan, *supra* note 157, at 1420.

213. *Id.* at 1457.

214. Fuhr, *supra* note 18, at 105. In his work, Fuhr proposes a new four-part framework with which courts should analyze cases involving unconstitutional conditions. *See id.* at 114–16. "Under this four-part approach, a condition would be unconstitutional if (1) it was not germane to a legitimate government interest, (2) it treated similarly situated people differently, (3) it was not a significant part of the benefit program, or (4) participation in the program was compelled." *Id.* at 116.

215. *See id.* at 109–10.

216. *Id.* at 109 (quoting Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1373 (1984)).

217. *See id.* at 110.

on state contracts and other financial benefits.[218] For example, the condition that a contractor not boycott Israel is in no way "germane"[219] to the award of a job building government offices. A hypothetical contractor should be permitted to perform a construction job, regardless of whether his outside activities include involvement in BDS,[220] in the same way healthcare providers in *Rust* were "unfettered" in their ability to advocate in favor of abortions outside of the narrow scope of Title X projects.[221] The disconnect in reasoning behind efforts to sever all financial benefits from BDS participants strongly suggests an attempt to manipulate organizations out of engaging in a constitutionally protected movement by using the purse of the government. The danger of such unrestrained efforts is "that Leviathan, swollen with tax dollars, will buy up people's liberty" and, in a desire to expand the sphere of state power, "the state will buy people out to control their decision making."[222]

1. Agency for Int'l Development v. Alliance for Open Society Int'l[223]

This application of the unconstitutional conditions doctrine is bolstered by the Supreme Court's recent decision in *Agency for International Development v. Alliance for Open Society International* ("*AID v. Alliance*").[224] In *AID v. Alliance* the federal government imposed a condition on the receipt of funding under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act")[225] that would require recipients to "have a policy explicitly opposing prostitution and sex trafficking" ("Policy Requirement").[226] Respondents, domestic organizations that received funding pursuant to the Leadership Act, challenged the Policy Requirement out of fear that adopting such a policy would "alienate certain host governments . . . by making it more difficult to work with prostitutes in the fight against HIV/AIDS."[227]

218. *See id.* at 105.

219. *See id. passim*.

220. See *supra* note 208 and accompanying text for a brief discussion of a contractor's performance falling below standards as a result of participation in a boycott against Israel.

221. Rust v. Sullivan, 500 U.S. 173, 203 (1991).

222. Sullivan, *supra* note 157, at 1494.

223. 570 U.S. 205 (2013) [hereinafter *AID v. Alliance*].

224. *Id.*

225. *Id.* at 208; 22 U.S.C. § 7601 et. seq. (2012).

226. *AID v. Alliance*, 570 U.S. at 208 (quoting 22 U.S.C. § 7631(f) (2012)). The Leadership Act also imposed a condition that "no funds made available by the Act 'may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.'" *Id.* (quoting 22 U.S.C. § 7631(e) (2012)). This condition was not challenged in the case. *Id.* at 211.

227. *Id*.

Citing *Rust*, the Court acknowledged that the government's taxing and spending powers "include[d] the authority to impose limits on the use of such funds to ensure they are used in the manner [intended]."[228] However, the Court highlighted that "the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and *conditions that seek to leverage funding to regulate speech outside the contours of the program itself*."[229] By its very nature, the demand that "funding recipients adopt . . . the Government's view on an issue of public concern . . . affects 'protected conduct outside the scope of the federally funded program.'"[230] Accordingly, the Court struck down the Policy Requirement as a violation of the First Amendment rights of respondents.[231]

The Court's analysis in *AID v. Alliance* is crucial as anti-BDS measures have been increasing throughout the United States.[232] In addition to the denial of financial benefits to those engaged in the BDS movement, several states and the federal government have proposed, and/or enacted, legislation requiring certification by those submitting bids or proposals for government contracts that they are not participating in a boycott of Israel.[233] Such conditions are akin to the Policy

228. *Id.* at 213 (citing Rust v. Sullivan, 500 U.S. 173, 195 n.4 (1991)).

229. *Id.* (emphasis added).

230. *Id.* at 218 (quoting *Rust*, 500 U.S. at 197).

231. *Id.* at 221.

232. "As of November 2018, 26 states have enacted anti-BDS laws." *Anti-BDS Legislation by State*, PALESTINE LEGAL, http://palestinelegal.org/righttoboycott (last visited Mar. 1, 2019).

233. *See*, *e.g.*, FLA. STAT. ANN. § 215.4725 (West 2016) (prohibiting Florida State Board of Administration (SBA) from acquiring securities from companies with contract provisions authorizing boycott of Israel and requiring SBA to place such companies on scrutinized list, notify company of scrutinized status, and encourage company to discontinue engagement in boycott of Israel); Boycott Our Enemies Not Israel Act, H.R. 1572, 114th Cong. (2015) (seeking to require all prospective U.S. government contractors to certify, under penalty of perjury, that they are not "refusing, or requiring any other person to refuse, to do business with or in the State of Israel, with any national or resident of the State of Israel, or a business concern organized under the laws of the State of Israel"); S.B. 327, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015–16) (prohibiting the State of Georgia "from entering into certain contracts with an individual or company unless such contracts contain a certification that such individual or company does not presently conduct a boycott of Israel and will not conduct such a boycott for the duration of such contract"); N.Y. Exec. Order No. 157 (June 5, 2016) (allowing institutions and companies to be removed from a blacklist "by submitting written evidence to the Commissioner that the institution or company no longer participates in boycott, divestment, or sanctions activity targeting Israel, either directly or through a parent or subsidiary"); Fla. Stat. Ann. § 215.4725 (West 2016) (including contract provisions authorizing termination of a contract if a company is engaged in a boycott of

Requirement demanding funding recipients to "adopt . . . the Government's view on an issue of public concern"[234] that the Court struck down as a First Amendment violation in *AID v. Alliance*.[235] It is therefore clear that requiring individuals and organizations to certify they are not engaged in boycott activity against Israel violates the First Amendment rights of individuals and organizations to engage in boycott activity outside the scope of the government-funded program of which they are beneficiaries.

III. ANALYSIS OF CURRENT ANTI-BDS LEGISLATION

Having established the applicable framework with which to analyze anti-BDS legislation, it is beneficial to closely examine certain state statutes to determine whether they are in violation of the Constitution. This note specifically analyzes New York and California because they fall on opposite ends of the constitutional spectrum. New York's executive order appears to be in clear violation of constitutional protections for boycotts while California's statute appears to be nothing more than a legislative condemnation of the BDS movement.

Israel and requiring certification upon submission of a bid or proposal for contracts with an agency or local governmental entity that the company is not engaged in a boycott of Israel). It is important to note that several of these laws extend the certification requirement to include subsidiary and affiliate organizations in addition to the main organization itself. *See, e.g.*, S.B. 327 § 1(a)(2),153rd Gen. Assemb., Reg. Sess. (Ga. 2015–16) ("'Company' . . . includ[es] all wholly owned subsidiaries, majority owned subsidiaries, parent companies, or affiliates of such entities or business associations . . . ."); N.Y. Exec. Order No. 157 (requiring submission of "written evidence that "company no longer participates in boycott . . . activity targeting Israel, either directly or through a parent or subsidiary"). In *AID v. Alliance*, the crux of the government's argument was that the condition on funding was acceptable because recipients were "permitted to work with affiliated organizations that [did] not abide by the condition, as long as the recipients retain[ed] 'objective integrity and independence' from the unfettered affiliates." *See* AID v. Alliance,570 U.S. at 219 (quoting 45 C.F.R. § 89.3). This would have given organizations the option to continue receiving government funds in compliance with the Policy Requirement while having an affiliate "communicate contrary views on prostitution." *Id.* However, the Supreme Court rejected the government's argument. *Id.* Creating a distinct affiliate to express the recipient organization's views still deprived the recipient organization of its constitutional right to express its beliefs. *Id.* Contrast the Court's treatment of such a scenario with the anti-BDS measures mentioned above which extend beyond the parent organization to reach subsidiaries and affiliates. Under these measures, no opportunity is granted to *any* organization—parent, subsidiary, or affiliate—to express support for BDS without losing access to the government's financial benefits.

234. *AID v. Alliance*, 570 U.S. at 218.

235. *See id.* at 219.

A. New York

New York Executive Order 157 ("EO 157") was signed into law by Governor Andrew Cuomo in June 2016[236] and continues to be one of the most expansive anti-BDS statutes nationwide. EO 157 directs the Commissioner of the Office of General Services to "develop a list of institutions and companies that the Commissioner determines, using credible information available to the public, participate in boycott, divestment, or sanctions activity targeting Israel, either directly or through a parent or subsidiary."[237] Those institutions are subsquently listed on the website of the Office of General Services.[238] The order then directs all "[a]ffected [s]tate [e]ntities", defined as "(i) all agencies and departments over which the Governor has executive authority, and (ii) all public-benefit corporations, public authorities, boards, and commissions, for which the Governor appoints the Chair, the Chief Executive, or the majority of Board Members, except for the Port Authority of New York and New Jersey," "to divest their money and assets from any investment in any institution or company that is included on the Commissioner's list."[239] The order further prohibits any future investment of money and/or assets in institutions or companies included on said list.[240] Entities that have been placed on the list and would like to be removed are required to provide "written evidence to the Commissioner that the institution or company no longer participates in boycott, divestment, or sanctions activity targeting Israel, either directly or through a parent or subsidiary."[241]

The order's language makes clear that, to deter entities from partaking in a boycott against Israel, the State is threatening to withdraw funding, including state contracts and investments, from any entity that boycotts Israel.[242] Applying the framework established by the Supreme Court in *Rust* and *AID v. Alliance*,[243] EO 157 clearly transgresses the boundaries of permissible state funding activities and becomes an unconstitutional condition. EO 157 does not place a permissible condition upon the receipt of state funds by, for example, saying that state funds cannot be used in furtherance of boycott

236. N.Y. Exec. Order No. 157 (June 5, 2016).
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. See id.
243. *See supra* Part II.

activity.[244] Instead, the order directs the investigation of entities that partake in BDS boycott activity, independent of any funding by the State, and uses that information as criteria for disqualifying the entity from further financial dealings with the State.[245] Such a law effectively places restrictions "on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in protected conduct outside the scope of the federally funded program."[246] This is the essence of an unconstitutional condition on state funding.

The order is further flawed in its prohibition against parent and subsidiary entity participation in BDS and its requirement that, in order for entities placed on the list to be removed, they must provide written evidence that they no longer partake in BDS activity.[247] The Court's holding in *AID v. Alliance* flatly rejected both of these features as violations of the First Amendment rights of entities receiving government funding.[248] The combination of these elements in EO 157 makes it clear that this law was enacted as an attempt to coerce state funding recipients to comply with the state's position on a matter of public policy. As such, the order should be struck down at the first available opportunity as an unconstitutional infringement upon the First Amendment rights of boycotting entities.[249]

B. California

Within a few months of New York's executive order, California also passed a law aimed at combating the growth of the BDS movement throughout the state.[250] However, California's legislation adheres to the constitutional framework set forth in *Rust* and *AID v. Alliance*,[251]and, despite strongly condemning the BDS movement, does not transgress upon the rights of BDS boycotters.

California Assembly Bill 2844 requires

244. *See* N.Y. Exec. Order No. 157(June 5, 2016).
245. *See id.*
246. Rust v. Sullivan, 500 U.S. 173, 197 (1991).
247. *See* N.Y. Exec. Order No. 157 (June 5, 2016).
248. *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. 205, 219 (2013).
249. The fact that the law was passed via executive order as opposed to the normal democratic legislative process is also cause for concern. Governor Cuomo signed the order "[a]fter it became clear a bill with the same purpose would not pass the State Assembly." Daniel Sieradski, *Andrew Cuomo's Anti-Free Speech Move on BDS*, N.Y. TIMES (June 12, 2016), https://www.nytimes.com/2016/06/13/opinion/andrew-cuomos-anti-free-speech-move-on-bds.html.
250. *See* A.B. 2844, 2015–16 Leg., Reg. Sess. (Cal. 2016).
251. See supra Part II.

> a person that submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a state agency with respect to any contract in the amount of $100,000 or more to certify, under penalty of perjury, at the time the bid or proposal is submitted or the contract is renewed that they are in compliance with the Unruh Civil Rights Act and the California Fair Employment and Housing Act, and that any policy that they have adopted against any sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the nation and people of Israel, is not used to discriminate in violation of the Unruh Civil Rights Act or the California Fair Employment and Housing Act. By requiring a person to certify under penalty of perjury, this bill would expand the definition of a crime, thereby imposing a state-mandated local program.[252]

While the statute does require a certification by parties submitting bids and proposals to enter into or renew contracts with the state, the statute places no restrictions on entities beyond compliance with pre-existing anti-discrimination laws.[253] There are no restrictions upon what activities a contracting entity can be involved in outside of a state-funded project, no blacklists, no restrictions on affiliated parent or subsidiary corporations, and no certifications of compliance with a state's political position.[254]

Some have argued that anti-BDS legislation falls within the same category as valid anti-discrimination legislation.[255] However, this argument is belied by the very existence of those same anti-discrimination laws; if, for example, someone has been discriminated against based on race, religion, or national origin, they are already afforded powerful legal remedies through various state and federal protective acts and there is no need for additional state legislation to address the matter.

California's anti-BDS legislation is an example of a law that can be emulated in condemning BDS while keeping in line with the constitutional limitations on restriction of speech. California made its opposition to BDS clear and reaffirmed its support for the State of Israel while avoiding the heavy-handed tactics utilized by other states in

252. *Id.*
253. *See id.*
254. *See id.*
255. *See, e.g.*, Gilad Edelman, *Cuomo and BDS: Can New York State Boycott a Boycott?*, NEW YORKER (June 16, 2016), http://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott.

attempting to suppress BDS activity. Accordingly, the law does not raise significant First Amendment concerns.

IV. CONCLUSION

The right to boycott has been a powerful part of our society since its founding. The propagation of anti-BDS bills and legislation over the last several years raises several concerns for the direction of free speech in our democracy. Our nation has seen an increase in the use of boycotts as a tool of empowerment as political issues have polarized various parties on all ends of the spectrum.[256] Civil rights groups, animal rights groups, and many others have utilized boycotts to convey their messages. If the types of anti-BDS laws proposed and implemented by states like New York to protect foreign nations are held to be constitutional and allowed to permeate our society, what will stop those same laws from being used to suppress boycotts against domestic targets?

Parties who are given the freedom to state their position and to encourage others to adopt it "will recognize that they have been treated fairly. . . . They will feel that they have done all within their power, and will understand that the only remaining alternative is to . . . resort to force, a course of action upon which most individuals . . . are unwilling to embark."[257] The use of boycotts and other non-violent methods of protest are a means of escaping the often-violent history of the Israeli-Palestinian conflict. If non-violent means are repressed, many will find that the only option is to regress to the decades-long history of retaliatory violence between the two sides.

Surprisingly, the domestic debate within Israel's own borders regarding the BDS movement has been more vigorous than the U.S. backlash against anti-BDS laws. While few of the states' anti-BDS laws have been seriously debated or litigated here in America, many Israelis, Jews, and *opponents* of BDS are themselves fighting anti-boycott legislation within Israel as an infringement upon free speech.[258]

256. *See, e.g.*, Harper, *supra* note 89.

257. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 885 (1963).

258. *See* Arie Peled, *The Israeli Anti-Boycott Law: Should Artists Be Worried?*, 32 CARDOZO ARTS & ENT. L.J. 751, 752–56 (2014). *See also* Lior A. Brinn, *The Israeli Anti-Boycott Law: Balancing the Need for National Legitimacy Against the Rights of Dissenting Individuals*, 38 BROOK. J. INT'L L. 345,346–47 (2012) (arguing based on "the body of Israeli free speech and free expression jurisprudence, as well as international norms and policy concerns, the Israeli Supreme Court should overturn the[Israeli anti-boycott law] as an impermissible intrusion on fundamental rights"); Harriet Sherwood, *Israel's Boycott Ban Draws Fire From Law Professors*, GUARDIAN, (July 14, 2011 10:20 AM),

Supporters of free speech in the United States should take the lead and recognize that "[y]ou don't have to support the . . . Boycott, Divestment and Sanctions movement to be troubled when state governments in this country penalize American citizens for their political speech."[259]

https://www.theguardian.com/world/2011/jul/14/israel-boycott-ban-criticised ("Israel's new law effectively banning political boycotts is unconstitutional and does grievous harm to freedom of expression and protest, three dozen eminent Israeli law professors have said in a petition.").

259. The Times Editorial Board, *Boycotts of Israel are a Protected Form of Free Speech*, L.A. TIMES, (July 5, 2016 5:00 AM), http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html.